Filed 9/29/09 P. v. Tindell CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAYMOND DYLAN TINDELL,<br><br>Defendant and Appellant. | C059965<br><br>(Super. Ct. Nos. SF108181A & SM262809A) |

In these two matters consolidated for trial and sentencing, a jury found defendant Raymond Dylan Tindell guilty of being under the influence of a controlled substance, driving while under the influence of drugs, and possessing controlled paraphernalia in January 2008 (case no. SM262909A). It further found him guilty of driving recklessly while fleeing a pursuing peace officer, being under the influence of a controlled substance, driving under the influence of drugs, driving with a suspended license, and resisting arrest in May 2008 (case no. SF 108181A).

The trial court sustained recidivist allegations that the defendant had a prior prison term, and a prior conviction. In

its oral rendition of judgment, the trial court struck the finding of the prior prison term (because it did not think the reckless evasive driving was particularly egregious) and sentenced the defendant to state prison.

On appeal, defendant argues with respect to the conviction for reckless evasive driving that the evidence is insufficient and the pattern instruction is unconstitutional because relying on three or more moving violations to prove the offense amounts to an impermissible mandatory presumption. He also contends the pattern instruction on flight as an indicium of guilt reduced the prosecution's burden of proof with respect to the offenses in which flight was an element. Finally, he maintains the abstract of judgment is incorrect because it reflects that the court stayed rather than struck the finding on the prior prison term.

The People correctly concede the latter contention, as it is an unlawful sentence to stay rather than strike the finding. (*People v. McCray* (2006) 144 Cal.App.4th 258, 267.) We will direct the trial court to issue an amended abstract of decision, but otherwise reject the defendant's arguments and affirm the judgment.

FACTS

The circumstances of the January 2008 offenses are not relevant to any of defendant's arguments on appeal. We thus omit them.

The pertinent facts relating to the May 2008 offenses are minimal. At "approximately" 3:18 am, an officer in uniform and

a marked patrol car observed the defendant's vehicle driving 42 miles per hour in a 25 mile-per-hour zone. The officer activated his overhead lights to initiate an enforcement stop. Disregarding a stop sign, the defendant immediately turned onto another street. He was driving about 20 miles per hour through the stop sign. The officer turned on his siren and followed. The defendant accelerated to 50 miles per hour. He ran the stop signs as he turned at the next two intersections at about 20 to 30 miles per hour. He did not signal during either these turns. He accelerated to about 60 miles per hour, weaving back and forth between the lines of parked cars. He eventually turned onto the original street without signaling, heading north, driving 40 miles per hour.

Suffice to say, as the officer continued to pursue him, the defendant continued in this course of conduct as he made a half-dozen or more turns through the neighborhood, slowing to 10 to 20 miles per hour when running stop signs, failing to signal his turns, and otherwise exceeding the speed limit (at times approaching 60 miles per hour) as he weaved between the parked cars. No people were present, however. The chase ended in an alley, where the defendant abandoned his car and took off on foot. The entire pursuit had lasted two to three minutes over the course of "about" 1.6 miles. The officer chased down the defendant and was finally able to arrest him only after the defendant had run headlong into a window air conditioning unit and the officer had tasered him, and then only with the physical assistance of his partner.

DISCUSSION

I

The defendant's first two arguments are interrelated. He asserts that the description of his driving during the officer's pursuit established nothing more than mere negligence. In his view, the pattern instruction incorporating the statutory language that the element of driving with willful or wanton disregard for property or the safety of others "includes, but is not limited to, driving while fleeing . . . a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count . . . occur" (§ 2800.2, subd. (b))[1] creates an unconstitutional mandatory presumption. In his view, "[a]bsent the mandatory presumption, which allowed [him] to be convicted based only on his committing traffic violations, there is [in]substantial evidence" to support this element.

As the defendant recognizes, *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392-393 (*Pinkston*), rejected the argument that the instruction creates a mandatory presumption because the *statute* established a rule of substantive law: committing three traffic violations in the course of evading capture amounts to reckless driving (in addition to any other set of circumstances that might satisfy the element). We agreed with this conclusion in *People v. Williams* (2005) 130 Cal.App.4th 1440, 1445-1446

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[1] The trial court instructed the jury in this language.

(*Williams*), as did *People v. Laughlin* (2006) 137 Cal.App.4th 1020, 1027-1028, and *People v. Mutuma* (2006) 144 Cal.App.4th 635, 641 ("Three point violations are willful and wanton disregard by definition, so there is nothing other than their existence for the jury to find"). In *Williams*, *supra*, 130 Cal.App.4th at pages 1445-1446, we rejected the analysis underlying the dissent in *Pinkston*, *supra*, 112 Cal.App.4th at pages 396-397, on which the defendant relies in arguing to the contrary. We do not find it any more persuasive at present. As a result, we reject these arguments.

The officer testified to observing the defendant commit more than three traffic violations in the course of his pursuit. This is substantial evidence to support the verdict, and the instruction to this effect is not constitutionally infirm.

II

In instructing the jury on the use of evidence of flight, the trial court employed the standard language that, "If the defendant . . . tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant . . . tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant . . . tried to flee cannot prove guilt by itself."

In closing argument, the prosecutor referred to this instruction in connection with the counts charging reckless evasive driving, driving under the influence, and driving with a suspended license. "Now this ties into [the count of reckless

evasive driving] but this may be more related to [driving with a suspended license] because when he was being stopped he fled. It almost gives another reason why he fled. . . . [It] basically says he has consciousness of guilt as to possibly these three counts [reckless evasive driving, driving under the influence, and driving with a suspended license] because we know he was doing this before the officer got to him." The prosecutor returned to this point in discussing the defendant's knowledge of driving with a suspended license: "Well, he was notified and here's the document to prove it . . . and he was fleeing and that's kind of like the flight instruction[] I read to you and how it ties in. He knew his license was suspended not only from this document but because he was evading the police when he got pulled over . . . ." Finally, the prosecutor tied the defendant's flight *after* getting out of his vehicle to the count of resisting arrest (as distinguished from his flight in his vehicle). Defense counsel did not address the issue of flight as an indicium of guilt in any respect.

After making boilerplate statements about the flight instruction "lessen[ing] the prosecution's burden of proof and allow[ing] the jury to draw an impermissible inference of guilt" and "allow[ing] the jury to find an element of the two offenses on less evidence than proof beyond a reasonable doubt," the defendant at last explains that "[a]n instruction which assumed 'flight' allowed the jury to find an element of the evading and resisting offenses based on the instruction rather than the evidence."

We first reject the People's "oft-repeated, but only occasionally applicable, contention the issue [is forfeited] . . . because defendant[] failed to object to, or request a modification of, the challenged instruction. As appellate courts have explained time and again, merely acceding to an erroneous instruction does not constitute invited error . . . [n]or must a defendant request amplification or modification in order to preserve the issue for appeal where . . . the error consists of a breach of the trial court's fundamental instructional duty." (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) However, we do not find that the instruction as given violated any substantial right of the defendant under *People v. Smithey* (1999) 20 Cal.4th 936, 976, footnote 7, or Penal Code section 1259.

We must determine whether it is *reasonably likely* the jury would have interpreted a challenged instruction in light of entire charge in the manner the defendant posits. (*Boyde v. California* (1990) 494 U.S. 370, 378, 380 [108 L.Ed.2d 316, 328, 329]; *People v. Kelly* (1992) 1 Cal.4th 495, 525.) We thus do not concern ourselves with whether a meaning can be "teased out" of the instruction. (*People v. Avena* (1996) 13 Cal.4th 394, 417.) In determining the reasonable likelihood of a proffered interpretation, we may consider the arguments of counsel. (*People v. Kelly, supra,* 1 Cal.4th at pp. 526-527; *People v. Cuevas* (2001) 89 Cal.App.4th 689, 699.)

As to the flight elements of reckless evasive driving and resisting arrest, the court had instructed the jury generally

that "[w]henever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." As to the former offense, the court instructed, "the *People must prove* that . . . the defendant, who was also *driving* a motor vehicle, willfully fled from or tried to elude the officer intending to evade the officer." (Emphasis added.) As to the latter, the court instructed, "The People allege that the defendant resisted . . . [the officer] by doing the following: *Running* away and failing to stop *running*. You may not find the defendant guilty unless you all agree that *the People have proved* that the defendant committed at least one of the[se] alleged acts of resisting . . . a peace officer . . . performing his duties . . . ." (Emphasis added.)

The flight instruction does not include anything that would reasonably suggest to jurors that they should disregard the express direction of the need to find the element of flight in either of these offenses beyond a reasonable doubt. Nor does the flight instruction, which by statute *must* be included in the jury charge whenever there is evidence logically indicating guilty flight, impart an assumption of the existence of flight (*People v. Abilez* (2007) 41 Cal.4th 472, 521-522), as the defendant apparently argues. Finally, the arguments of the prosecutor first identified the flight *on foot* after "the officer got to him" as the factual basis for the flight instruction (distinguishing it expressly from the act of *driving* that was the factual basis for the charge of reckless evasive driving). He then connected this consciousness of guilt with

the three offenses involved in the *driving* of the vehicle. The prosecutor never suggested that the *flight instruction* had *any* application to the charge of resisting arrest, instead identifying the flight *on foot* as the factual basis for that offense. Therefore, based on the wording of the instructions and the argument of counsel, we reject this claim.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of decision indicating that it struck the finding of a prior prison term, and forward it to the Department of Corrections and Rehabilitation.

NICHOLSON, J.

We concur:

SIMS, Acting P. J.

HULL, J.